International Criminal Law Review

The End of an Era: Static and Dynamic Interpretation in International Courts

--Manuscript Draft--

Manuscript Number:	ICLA-1106R1
Full Title:	The End of an Era: Static and Dynamic Interpretation in International Courts
Article Type:	Special Issue International Criminal Law and Philosophy of Law
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Abstract:	90% of International Courts (ICs) legal decisions have been issued within the last two decades. This increase in case law - along with other significant changes in the operation of ICs - signals a new form of judicialised International Law. This change is best described as a shift from a 'static' regime of contractual relations between sovereign states to a more 'organic' regime of 'living law'. In Criminal Law, this development is exemplified by the reasoning of the ICTY, the ICTR and the ICC. In examining the institutional undercurrents that accompany these changes important questions arise: through what social processes is legitimacy imputed to ICs? How do ICs handle or avoid crises in legitimacy? In the context of recent critiques of judicial reasoning in International Criminal Law, the article suggests that the analysis of case law from ICs must become as dynamic and agile as contemporary International Law itself.

Reviewer #1: The article is very interesting and offers new philosophical insights on a topical subject as judicial interpretation of international law and the role of international courts.

My observations are the following:

Page 1 - Footnote 4: the correct title seems to be "The Global Spread of European Style INTERNATIONAL Courts"

We have made the necessary correction. Thanks.

Page 2 - lines 4-9: the dynamic interpretation of treaties is explored to a considerable extent in international law scholarship and there are a few important contributions that could be mentioned, first of all the articles by Malgosia Fitzmaurice: "Dynamic (Evolutive) Interpretation of Treaties, Part I", 21 Hague Yearbook of International Law (2008), pp. 101-153; Id., "Dynamic (Evolutive) Interpretation of Treaties, Part II", 22 Hague Yearbook of International Law (2009), pp. 3-31

These are helpful suggestions that we have incorporated. Thanks.

Page 2 -line 30: why does the author employ the term "member states"? Maybe he refers in general to members of the international community at large, but it is not clear. This would make an international lawyer think immediately to some international organization or other inter-state consortium involved in the discourse.

The term “member states” is used to reflect that states are still the predominant context for identifying the relevant social, cultural and economic developments, which feed into the interpretive practices of international courts. While these developments will usually only impact on interpretation, when those developments are widespread (i.e. cover more states), member states usually form the context for identifying those developments. To avoid the potential for misunderstanding that is referred to by the reviewer, we have decided to refer instead to “the societies that are subject to the IL in question”. And have modified the following sentence to more clearly express our main point: “Consequently IL is now being shaped by a continuously evolving case law which is sensitive to underlying social, cultural and economic development, which undoubtedly leads ICs to make decisions on issues that would not have arisen under a ‘static’ model”.

Page 6 - line 4 "means by which we which distinguish": is the second "which" superfluous?

Yes – a clear typo, which we have now corrected. Thanks.

Page 14 - lines 41-43: it seems to me that it is rather unusual to use the term "contract" to refer to international treaties- it might be deceptive inasmuch as States conclude contracts with private subjects

The term was selected to refer back to the “Pacta Sunt Servanda” paradigm we described at the beginning of the article. The context should explain that we do not mean for the word “contracts” to refer to contracts involving private parties. The term is supposed to reflect that in the absence of a universal international authority that can operate as a legislator and thereby create obligations for states, states are

only subject to obligations that they create for themselves through treaty making. We compare this treaty making to the making of a contract. Since we use “treaties” in brackets immediately after contracts, we do not think that misunderstanding is likely to happen, but in light of the reviewers comments we have decided to replace “contracts” with “agreements”

Page 22 - line 51: "train" is repeated twice

Now corrected

Page 23 - line 38: maybe the expression "against their state" is a bit too restrictive, unless it serves a specific intention on the part of the author. As he certainly knows, the Strasbourg court also examines cases brought by individuals against states different from the applicant's national state (not to mention cases brought by one state against another party to the convention)

Thank you for this pertinent observation. There was no intention to use this restrictive language. Sentence now reads:

“Whereas the ECTHR adjudicates cases between states and individuals who claim that their human rights have been violated, the ICTY adjudicates criminal cases against individuals.”

Two further general observations:

1. as to the law-making role of the Strasbourg Court, the author mentions LGBT rights, however the extensive and evolutive interpretation of the European Convention, according to its nature of "living instrument", can be referred to several other topics, as for example all bioethical sensitive issues which have gained prominence in recent years

   We certainly agree with this, and LGBT rights is used only as an illustration of the dynamic that is introduced to the law in this area by the Court. We mention a few other examples on p. 13. To be clear we have now added a footnote where we introduce the issue of LGBT rights, which makes it clear that this serves as an illustration only, and that other illustrations could be found.

2. concerning legal reasoning and morality, I would like to highlight the existence of authoritative cases where international courts rely on a rather limited and politically oriented interpretation of custom and opinio juris. In so doing they declare what the law in force is without taking in the least consideration the relevant moral issues, or to say with the author without blending "moral assessment … into source-based argument" (page 3 - line 37). A recent example in point is the judgment delivered by the ICJ on 3 February 2012 in the dispute concerning the "Jurisdictional immunities of the State (Germany v. Italy)" where the Court reconstructed the scope of the customary rule on sovereign immunity in contrast with all moral considerations concerning the right of victims of war crimes to effective judicial protection and redress. This was indeed perceived as a bad decision which was the object of harsh criticism, since the Court was accused of having been too legalistic and mechanical in its assessment of international practice (as the author says at page 8 - line 42-44). All this notwithstanding the ICJ has long been recognized as one of the most

authoritative law-making courts (Hersch Lauterpacht, The Development of International Law by the International Court (1982); Robert Y. Jennings, "The Role of the International Court of Justice", 68 British Yearbook of International Law (1997) pp. 1-63; Stephen M. Schwebel, "The Contribution of the International Court of Justice to the Development of International Law", in W.P.Heere (ed.), International Law and the Hague's 75th Anniversary (1999) pp. 405-416.)

This comment is quite general and not addressed at any specific part of the article. Furthermore the issue addressed in the comment is quite complex, and we agree with most observations. We would perhaps add that even though a court does not explicitly address the moral issues that are affected by a given decision by that court, it does not mean that the moral issue has not been made the object of consideration. Not every consideration that plays a part in the deliberation process finds its way to the formal decision that is being published by the court. Furthermore, we think there is a distinction to be made between the moral issues raised by the particular circumstances of the particular case on the one hand, and the moral issues raised by the institutional issues related to the Courts legitimacy and the processes of identifying the best interpretation of the relevant laws to be applied to the case. In the Germany vs. Italy example mentioned by the reviewer, what appears as a legalistic decision that shows no consideration for the moral importance of redress for victims of war, may well be the result of Gauging the implications of not respecting sovereign immunity in situations where redress relates to incidents that happened 70 years ago, and where The ECtHR had already ruled on the case (in favour of Germany) and finding those implication morally problematic in that it could potentially destabilize international relations if similar kinds of intrusion into sovereign immunity were allowed more generally. Hence what may appear as insensitivity to the rights of victims of war is really the result of a moral balancing of this right against the moral importance of not risking to destabilize international relations more generally. Thus while we appreciate the comment, we do not think that the article allows for further elaboration on this complex issue.

The End of an Era: Static and Dynamic Interpretation in International Courts

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1. The Phenomenon of Judicialised International Law

Over the past couple of decades, one of the most important transformational processes in law and society has been the significantly increased importance attached to international law[1] An important but academically neglected development in this process is the intensified juridification of international relations by a steady growing population of International Courts (ICs).[2] Nearly 90 per cent of the total IC output of legal decisions has been issued over the last two decades,[3] and ICs are simultaneously gaining more autonomy from nation states: more have compulsory jurisdiction, many allow agents other than states to initiate litigation before them, and several have the authority to review state compliance with international rules.[4] This development could be summed up as a move towards a new form of judicialised International Law that heralds a change not only in the role of International Law in (international) society, but also, and more importantly for our purposes, in the nature of International Law itself. The essential feature of this transformational process is to be found in the shift from what might be called a *pacta sunt servanda* regime of contractual relations between sovereign states (i.e. a regime in which Courts make decisions in disputes between parties in relation to the provisions of a treaty), to a more dynamic and self-sustaining regime of 'living law' (in which courts interpret treaties as legal principles that have a more general role in preserving and promoting a well functioning international community).[5]

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[1] *e.g.*, A. M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

[2] *cf.* C.P.R. Romano "The Proliferation of International Tribunals: Piecing together the Puzzle". NYU *Journal of International Law and Politics*, Vol. 31, No. 4, (1999) pp. 709-51; and "A Taxonomy of International Rule of Law Institutions". International Dispute Settlement, Vol. 2 (2011). See also Shany, Y. *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2004).

[3] Karen Alter, "The New International Courts: A Bird's Eye View". *Buffett Centre for International and Comparative Studies Working Paper Series,* Vol. 09, No. 001 (2009) pp. 1-46.

[4] Karen Alter, "The Global Spread of European Style International Courts". *West European Politics*. Volume 35, Number 1 (2012) pp. 135-154.

[5] The literature surrounding the transformation of international law is considerable. Importantly, we note the contributions of: Klabbers, J. Peters, A. and Ulfstein, G. (2009); Koskenniemi, M. (2007); Dunoff, J.L. and

This dynamism[6] heralds a change in approach whereby ICs participate actively in developing the law.[7] These developments might also be explained in terms of a shift from *static* international law to a more *organic* process. Ideal-typically, static IL can be seen as comprising a thin background of *jus cogens* supplemented by treaties (bilateral and multilateral) fixing precise legal obligations between states, and expressed through a court system with one general court (ICJ) and perhaps several specialized courts with voluntary jurisdiction and *ad hoc* judges. Organic IL, however, although similarly characterized by a background of *jus cogens*, supplemented by treaties, now develops an added layer of case law that continuously interprets these treaty texts dynamically so as to reflect the underlying social, cultural and economic development, in the societies that are subject to the IL in question. Simultaneously, increased access to ICs by litigants other than states adds new forms of input to the decision making process. This development undoubtedly leads ICs to make decisions on issues that would not have arisen under a 'static' model.

The tendency to increased juridification and legalisation noted above arises naturally from increasing resort to law as a means to both conflict resolution and conflict prevention. This straightforward relationship has, however, complex undercurrents, three of which should be noted here as a prelude to our more specific concern with contemporary approaches to judicial reasoning in International Criminal Law[8]. The first

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Trachtman, J.P. (eds.) *Ruling the* (2009) Koskenniemi M. *World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009) and most recently, Cassese, A *Realizing Utopia* (OUP 2012).

[6] The dynamic interpretation of treaties is explored to a considerable extent in international law scholarship. An important contribution in this respect is Malgosia Fitzmaurice: "Dynamic (Evolutive) Interpretation of Treaties, Part I", *21 Hague Yearbook of International Law* (2008), pp. 101-153; and "Dynamic (Evolutive) Interpretation of Treaties, Part II", *22 Hague Yearbook of International Law* (2009), pp. 3-31.

[7] We might note that an IC such as ECtHR, is, of course, far removed from the *pacta sunt servanda* paradigm, rather, the practices of this court would serve as an illustrative example of what we have in mind. Similarly, International Criminal Law has never been understood as part of the *pacta sunt servanda* paradigm; The ICL, however, already served as the paradigmatic example for W. Friedman to speak of "the changing structure of International Law" in the 1970s. Hence, we might observe two distinct but related related trends: (i), a move beyond the *pacta sunt servanda* paradigm and (ii), the increased development of the law by ICs - i.e., judicial activism. We are grateful to Ingo Venzke for this important observation.

[8] These three dimensions have been identified in the work of Mikael Rask Madsen where he explains the emergence and transformation of the European Court of Human Rights (ECtHR) following three interdependent social, legal and political processes: the institutionalisation, autonomisation and legitimisation of the ECtHR. See for example, M. R. Madsen, "The Protracted Institutionalisation of the Strasbourg Court: From Legal

concerns the organisational/ institutional arrangements relating to the social, economic and political conditions conducive to the emergence and continued existence and operation of International Courts. The second concerns the formal and specific legal mechanisms and strategies through which International Courts have developed the law and carved out their role and function in International Law and International Relations. A third aspect relates to questions of legitimation: How do International Courts create legitimacy? Through what social processes is legitimacy imputed to ICs? How do ICs handle crises in legitimacy or, as a daily concern, how do they avoid such crises? It is on this latter point that our thinking must become as dynamic and agile as contemporary International Law itself. For although it is sensible to regard legitimacy as a by-product of legality, it would, we suggest, be a mistake to assume that legitimacy only follows the *static* conception of international legality[9]. This latter conception, we argue, is often unreflectively reliant upon an under-theorised notion of 'source' as a basis for conceptions of legality that is now rapidly being superseded by the need of ICs to respond to ever more complex fact situations and an ever expanding corpus of relevant legal material (sources). The present situation for ICs – at least for the more specialised and prolific ones - is now such, we contend, that the decision making processes are so complex that moral assessment blend into source-based arguments. An understanding of how this blended reasoning operates will allow for a deeper insight into how ICs create and manage the legitimacy in their position as institutionalised operators of the International Law that falls under their jurisdiction. In what follows, we shall draw on both history and theory in an attempt to provide a clearer understanding of this phenomenon.

2. Judicialisation and Autonomy

A great deal of Legal Theory emphasises the autonomy of law to explain two key aspects of legal order as opposed to other forms of social normativity. One aspect is the distinctness of a legal rationality (i.e. an allegedly special type of justificatory reasoning); the other is its place in society as normatively dominant or supreme (by which theorists refer to the 'pre-

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Diplomacy to Integrationist Jurisprudence" In. Madsen, M. R and Christoffersen, J. (eds.) *The European Court of Human Rights Between Law and Politics*, (Oxford: Oxford University Press, 2011), pp. 43-60; Also Madsen, M. R. "Legal Diplomacy - Law, Politics and the Genesis of Post-War European Human Rights", in Hoffmann S. L. (ed.), *Human Rights in the Twentieth Century: A Critical History* (Cambridge: Cambridge University Press, 2011), pp. 62-81.

[9] Recent contributions in the Philosophy of International Law supports this, *See.* e.g. Samantha Besson and John Tasioulas (Eds.) *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010) and especially the contributions by Besson (Ch. 7) and Paulus (Ch. 9).

emptive' and 'exclusionary' quality of legal norms). Some of the most influential Legal Theory construes in effect a conceptual strategy for comprehending these essential products of the autonomy of law.[10] More often than not this body of theory uses national constitutional orders (implicitly or explicitly) as primary reference points for its conceptual inquiries and focuses on the extent to which it is possible to identify what the law of a given jurisdiction *is* without resort to free-standing moral or political reason[11]. It is important that we attend to this strand of jurisprudential work, although the critical account of the significance of the autonomisation processes that we shall offer presently does not endorse the accepted conceptual separation of law from morality (or economy, or politics, or psychology). Instead, we propose a framework of ideas that will allow us to discern, articulate theoretically, and point empirically to the processes by which legal agents (*in casu* International Courts / judges) develop the law through adjudicative practices in such a way as to make the entire *corpus* of doctrine more case-law dependent. It is through this largely interpretive activity that international courts enhance their own role in the field of international law and governance[12]. The focus of the inquiry, then, will be to examine the way ICs administer their role in the field of international law and governance and to identify the matrix in which this administration takes place. Orthodox jurisprudential scholarship provides a useful point of departure for the inquiry. Gerald Postema presents the perhaps most detailed and comprehensive account of law's autonomy[13] by way of three interrelated theses:

(i) The Limited Domain Thesis

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[10] For an initial guide to the theory see, or example, the collection of essays in Robert P. George (Ed.) *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996).

[11] Hart's 'Rule of Recognition' is a classic example. See, for example, Hart HLA *The Concept of Law* (Clarendon Law Series, Oxford University Press, 3rd Edition 2012) pp 94-96 and compare his analysis of International Law at pp. 213-23. Similarly, Ronald Dworkin, although a critic of Legal Positivism, has developed his legal theory specifically in relation to the American Legal System (*see* Ronald Dworkin, *Law's Empire*. (Fontana Press, 1986). Kelsen's notion of the 'Basic Norm' or *Grundnorm* can in principle be applied to both national and international law. *See importantly* Hans Kelsen, (a) (1966) *Principles of International Law* (R. W. Ticker Ed., Holt, Rhinehart and Winston Inc. , John Hopkins University Press, 1966) pp. 177, 178.

[12] For a recent contribution to understanding this phenomenon, *see* Ingo Venzke *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. (Oxford University Press, 2012) Chapter 2. Importantly, see also, in this Special Issue: Matwijkiw Anja and Matwijkiw Bronik, "Stakeholder Theory: The Philosophical Advantages and Disadvantages for International Criminal Law".

[13] Gerald J. Postema, 'Law's Autonomy and Public Practical Reason', in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996).

Postema says that law defines a limited domain of practical reasons or norms for use by officials and citizens alike. Law cannot operate as a specialized and specified normative field without some form of delimitation between the legal and the non-legal. Law, in other words must be perceived as a delimited normative field, where the (pre-emptive and exclusionary) norms of law and the negative sanctions attached to them for non-compliance are valid only if they characteristically belong to the domain. One important way of delimiting the domain is codify and list the posited sources that define law's limited domain. This is reflected in the 'Sources Thesis'.

(ii) The Sources Thesis

This thesis holds that normative membership in law's limited domain is determined by criteria which are defined exclusively in terms of non-evaluative matters of social fact (about their sources), such that the existence and content of member norms can be determined entirely without appeal to moral or evaluative argument. Legality is then clearly tied to positivity in that positivity is necessary to maintain the coherence of the limited domain thesis. In turn, the limited domain becomes simultaneously the *referent* of the legal and the *means by which we distinguish* the legal from the non-legal. But limiting the domain in terms of positivity in this way is not sufficient – one more element is required to assure autonomy in the analytical sense.

(iii) The Pre-Emption Thesis

Rules in Law's limited domain operate as 'pre-emptive' and 'exclusionary' reasons for action. This is perhaps best understood by way of Raz's concept of the 'normal justification' of authority. That is, even where legal rules (and an account of obligation in respect of them) are superfluous in the sense that a reasonable person would act in accordance with them on their own common-sensical volitions, legal rules give practical reasons for action which pre-empt ordinary choices of action and which preclude other reasons for action. Thus, for example, choosing a convenient parking place is pre-empted by designated parking areas and restrictions, and reasons falling outside the domain (for example, parking on double yellow lines because you are in a hurry to get home to watch sport on TV) is excluded. In this way, rules within the limited domain are distinguished from norms outside of the domain - even when they coincide in content, purpose and practical rationale.

These three interrelated theses express the core notion of legality – it's exclusionary character *vis á vis* other normative domains (morality, politics, religion, etc.) It remains clear however, that this artificial notion of autonomy cannot fully grasp the over-lapping normative complexity of any viable, modern socio-economic formation. Law's autonomy is only

relative and the Autonomy Thesis cannot explain legal practice in its totality. Postema, of course, is fully aware of this, and he points out that the AT needs to be embedded in an institutional context. This is because the norms that are identified by the 'sources thesis'

> … are authoritatively interpreted and applied, and the system of norms is maintained, by adjudicative institutions. Moreover adjudicative institutions are authorized to settle issues left unsettled by the set of source based legal norms available at any point in time. Since, in such cases, by hypothesis, the existing legal considerations are silent, indeterminate, or in conflict, the Court' setting of them is determined not by appeal to the law, but by appeal to considerations outside its limited domain. [Emphasis added] [14]

3. From the 'Limited Domain' to 'Transformative Dynamics'

Legal norms are applied and interpreted by Courts and it is in this capacity that there is sometimes scope for Courts to operate outside the limited domain. The line between applying, interpreting, adjusting, modifying, adapting and altering the law is fine: effectively, social normativity is being re-coded (transformed) and dynamically (creatively, pragmatically) fashioned into legal normativity from material that exists - or might plausibly be purported to exist - both within and without the limited domain. It is in this 'Grey Zone' of the law, that the matrix of judicialisation is active. This matrix is the transformative and dynamic location wherein Courts map and re-code the 'Grey Zone' that is the normative area between the intra-legal and the extra-legal. To lay claim to this territory, Courts will promote argumentation frameworks that serve as platforms for converting Grey Zones into *intra-legem* zones. In so doing, Courts, in their case law, articulate legally what is sometimes referred to as judicial politics, i.e. they manufacture precedent in the Grey Zone. Effectively, through dynamic judicial activity, courts synthesize new law which can be absorbed by the pliable framework of doctrine and constituting principle behind the existing positive law. This process of dynamic judicialization - contrary to what, in theoretical retrospect should appear to us increasingly as the *static* logical ideal of a 'limited domain' - inevitably must involve political and moral choices. Alec Stone Sweet captures the character of this process in his article on the law's 'path dependence'. He says,

> I assume that judges seek to maximize, in addition to private interests, at least two corporate values … First, they work to enhance their legitimacy vis-à-vis all potential disputants by portraying their own rule-making as meaningfully constrained by, and reflecting the current

[14] Postema, *supra* note 12, p. 93.

> state of, the law. Second, they work to enhance the salience of judicial modes of reasoning vis-à-vis disputes that may arise in the future. Propagating argumentation frameworks allows them to pursue both interests simultaneously. Judges may also seek to enact their own policy preferences through their decisions. Yet the more they do so, the more likely judges will be to attempt to hide their policy behaviour in legal doctrine. Once policy is packaged as doctrine, it will operate as a constraint on future judicial law-making to the extent that doctrine narrows the range of arguments and justifications that are available to litigators and judges, and to the extent that the law is path dependent.[15]

There is, then, an intimate relationship between the precedent-driven development of law (the process of converting Grey Zones into established law) and the production of legitimacy. Portraying a legal decision as emerging from within "the law" as opposed to being policy led is more likely to produce the desired outcome in the form of clarifying the law and, insofar as this is seen as the operation of the expected and revered 'autonomy of law', it renders the decision more 'legitimate'. This does not mean, however, and as we shall explain presently, that we should hastily accept that the essence of legality, and thus of *legitimacy* is automatically to be located in this inner, doctrinal "packaging" as Stone Sweet has labelled it. In fact, if the decision is perceived as a 'bad' decision, Courts, as the juridico-political aspect of the wider social, economic and cultural process become the focus of criticism for being overly 'legalistic' and mechanical in their reasoning. This fact of life is simply a reminder that the 'autonomy of law' and the idea of a 'limited domain' are merely artificial orientations to the infinitely complex flux of competing normativities. For as Stone Sweet further points out:

> … courts may abandon precedent and start over; they may borrow doctrinal materials from other lines of case law considered more successful in some way; and the rule of incrementalism may be violated by dramatic new rulings.[16]

So, whilst case law does produce more depth and complexity in legal doctrine by adding to and qualifying existing texts, and while cases may be closely interconnected through argumentation frameworks, case law remains relatively malleable. This is precisely the reason why 'Law's Empire' (to use Dworkin's familiar phrase) can continue to grow. But it is important to notice that this growth, even though it takes us outside 'the limited domain', is never wholly detached from the domain. On the contrary – there is a certain sense in which

[15] Martin M Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford; New York: Oxford University Press, 2002) p.128.
[16] Shapiro and Stone Sweet, *supra* note 14, p.132

Courts retain and protect the autonomy of the legal system during the exercise of their competence to interpret and apply the law to new cases.

The notion of autonomy as applied to international law and international organisations (including international courts) takes on an added dimension in that legal autonomy is not only a matter of separating the legal from the non-legal (the political and the moral) – in the context of international law, it becomes also a matter of separating the international from the national. This means that autonomy as applied to the jurisprudence of international courts becomes a rather complex notion, which might be quite difficult to contain. To give a sense of this, Collins and White provide in their introduction to an edited volume dedicated to the exploration of the meaning of institutional autonomy for international organisations[17] a sense of what autonomy in international institutions entails at its most basic level. In a commentary to the ICJs *Reparations* decision from 1949[18], they write:

> When the Court claimed that "fifty states, representing the vast majority of the members of the international community, had the capacity … to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone …", it clearly recognized the impossibility of considering autonomy as merely a matter of the internal relations between institution and member states. The effect of bringing into being an organization such as the UN was that states had created an entity which was clearly more than the sum of its separate parts – having the ability, in other words, to exercise powers which no state could exercise in isolation." (Collins and White, 2011, p.2)

An autonomous international organisation, then, is an institutional entity with its own will. In the case of International Courts, this will is expressed – of course – through the court's case law. There is then – despite the complexity – a structural similarity between IC autonomy *vis a vis* states and IC autonomy *vis a vis* other forms of normativity. It can be maintained therefore, as a general observation of ICs legal autonomy, that this autonomy entails that the legal system (which the Court is a part), and thereby the autonomy of those who perform the functions of this system, do so in a way that is not dictated by other sources of power and authority in

[17] Richard Collins and Nigel D. White, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (London; New York: Routledge, 2011).

[18] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, 1949, p. 174.

(international) social life[19]. While ICs can receive input and derive inspiration from such other sources, its case law cannot be reduced to being a product of those other sources. ICs are autonomous because they operate a system of autonomous reasoning. Because of this autonomous reasoning it is not possible therefore to deduce computationally (as it were) answers to legal problems straight from the norms in the limited domain, and therefore one is forced to identify a form of reasoning which can operate *outside* the limited domain - yet not be seen as purely political or moral. If the law is autonomous, then it's must be able to define its own terms, and sanction the consequences that flow from describing the world in these terms. It must be able to identify and welcome solutions, trends, examples and analogies from its surrounding environment (society) and must be able to respond to these in ways that are considered relevant and legitimate. Yet it must do so in way that is alert to the inequitable influences and sectional interests of the power and status differences that permeate social life. This *ideal* of equitable neutrality is for the most part unattainable; yet the aspiration to autonomy is rightly operative as a functioning *telos* for the way courts operate. But rather than thinking about autonomy as an all–or-nothing attribute of a legal system, it would be more productive theoretically to focus on the degree to which a legal system or a court looks inwardly (to its own extant pronouncements) rather than outwardly when generating and developing argumentative frameworks. This perspective on judicial activity, in a different context, is what animates the American Legal Realist distinction between (a detached and *ex post facto*) 'formalism' and (a vibrant and responsive) judicial realism. Looking 'inwardly' here, means to attempt to construct answers to legal questions through the concepts that inhere in established canons of interpretation, and in doctrinal analysis, that seeks to establish commonalities and differences between various legal categories. In this 'involutional' doctrinal process judges over time, and by way of a series of cases, will attempt to refine the more precise content of legal categories. But it is not so much the judicial aspiration to present legal reasoning in line with the ideals of law's autonomy that will lead us astray here, but rather, the theoretical idolatry of the myth of *static* autonomous sources – in short, a naive belief that the Kingdom of the Limited Domain is a real place. This, essentially, is what Legal Realists past and present have rightly identified as a disingenuous (unrealistic) 'formalism' at work in the characterisation of law and the nature of adjudication. [20]

[19] *See* also John Merrills: 'International Adjudication and Autonomy', in: Collins and White, *supra* note 16.

[20] *See* Brian Tamanaha: *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010).

4. Static and Organic Conceptions of Legality

Examples of the failure to develop more dynamic and organic understandings of legal processes and consequently a failure to develop more agile critical concepts are numerous, but the ICTY's analysis of what constitutes a 'belligerent reprisal' in *Kupreškić*, and Kuhli and Gunther's commentary upon it offer an apposite illustration of the general problem and a suitable platform from which to progress[21]. Before dealing with the specific issue in *Kupreškić*, it will be useful to illustrate the problem at hand with a more general example.

The International Criminal Court (ICC) adjudicates cases where there is suspicion that a perpetrator has committed a crime against humanity. In this illustration the crime is that of murder, and the elements of it are described as follows: [22]

(i) The perpetrator killed one or more persons.
(ii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
(iii) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

The ICC, in cases brought before the court, will seek to define more precisely what "part of a widespread or systematic attack directed against a civilian population" means. Clearly, "part of" indicates a relationship between a particular perpetrator and a group of perpetrators in the sense of connection or coordination. "Widespread or systematic attack" indicates that

[21] The following analysis should be seen as a contribution to the ongoing debate in ICL theory over the extent to which ICL can and/ or should emulate the strict legality requirements familiar to us in national law. Mark Drumbl and Mark Osiel suggest that IL should operate with legality criteria that focus more on the extent to which agents might reasonably expect impunity for their acts rather than on the formal requirement that only *lex scripta* suffice as a basis for punishing individuals. The recent contribution by Darryl Robinson in "A Cosmopolitan Liberal Account of International Criminal Law" (*Leiden Journal of International Law* – forthcoming - Electronic copy available at: http://ssrn.com/abstract=2122926) sums up the debate so far (*see* especially section 6.1.) In relation to the analysis below we might note especially David Luban's "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law" (*Georgetown Law Faculty Working Papers* (2008) - Electronic copy available at SSRN: http://ssrn.com/abstract=1154177) – especially sections 6-8 of this paper.

[22] 'The Elements of Crimes' are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court - First Session, New York, 3-10 September 2002* (United Nations Publication, Sales No. E.03.V.2 Part II.B and *corrigendum*). 'The Elements of Crimes' adopted at the 2010 Review Conference are replicated from the *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010* (International Criminal Court Publication, RC/11).

murders were somehow planned and premeditated. Similarly, "directed against" means that the attack must have had a more or less specific purpose or intention. And, "knew that the conduct was part of or intended the conduct to be part of" means that the perpetrator must have been aware of what conduct he or she was involved in.

Each of these issues could separately be made the object of a doctrinal legal inquiry in which the law would look (inwardly) to itself and its own doctrinal canons of construction. In that sense, the law and its judges are attempting to "work the law pure". This is not to say that political, ethical, religious, economic or other normative standards are neglected or ignored. The point is that these other standards become relevant only to the extent that they can be articulated legally. But, as noted, this form of relevant articulation (i.e. *the legal*) need not be anchored in the inflexible and inorganic understandings of the static era of International Law. On the contrary, just as with the European Court of Human Rights (ECTHR), the ICC's activities should be understood in the context of political support for more humanitarian forms of government.

The ECTHR has adopted a dynamic approach to Human Rights and developments in the case law of the Court must be seen against the background of a political will to strive for higher humanitarian standards in this regard. This entails recognition of the overall support for the court in using its competence to decide concrete matters as an instrument for this purpose.[23] Hence, the ECTHR has used its case law as an instrument to promote, for example, a ban on a specific form of physical punishment of children in public schools (*Tyrer* v. *United Kingdom*); action against prohibition of homosexual activity demands on national courts to assure that accused persons receive a fair trial in criminal proceedings (*Hauschildt* v. *Denmark*) and the protection of women's health in situations where abortion was prohibited but where the well-being of the mother was threatened by the pregnancy (*Tysiac* v. *Poland*). The emergence of the ICC and the ICTY; and ICTR should be seen in a similar light. That is, the adjudicative institutions of International Criminal Law must be seen as products of the overall political will to push for higher standards with respect to protection of civilian populations in war zones and more generally for promoting respect for the laws of war. This means that the ICTY cannot be understood simply and literally as an *ad hoc* Tribunal whose only purpose is to make decisions in those (random) cases that are brought before it. It is possessed of a wider judicial remit whereby standards of law in these

[23] *See for example* Luzius Wildhaber, 'The European Court of Human Rights in Action', *Ritsumeikan Law Review*, Vol. 21 2004.

cases are made –and are expected to be made - more specific. Whilst we might say that ICL is still in its infancy (compared to e.g., International Human Rights Law or International Trade Law) there is a widespread consensus that the ICTY has been valuably effective in producing usable case-law in this respect.[24] It is perfectly understandable, therefore, that these organic achievements have led some commentators to suggest that the ICTY has, in some of its rulings, engaged not simply in adjudication and application, but in law-making.

Orthodoxly, this can be seen as operating outside of and beyond the traditional domain and functions of Courts. Kuhli and Günther rightly suggest that lawmaking "implies the idea that courts create normative expectations beyond the individual case."[25] This observation makes a familiar distinction between discourses of 'norm justification' and discourses of 'norm application'. The former is a discourse that is usually assumed to be characteristic of legislatures, and concerns the issue of what norms should be issued; the latter concerns the issue of how a given rule should be interpreted and applied to a certain set of circumstances - usually seen as the business of the courts. This distinction however is difficult to maintain, it is superficially plausible in a situation where legislatures are operational and capable of engaging in continuous, majoritarian decision-making processes. No such legislature exists in the international normative-institutional space that occupies us here. Rather, and as we noted in our introductory remarks, the paradigmatic perspective up until recently has viewed International Law as a creation of agreements (treaties) between states, and the enforcement of these by the ICJ, has primarily been a matter of interpreting these agreements (treaties). The starting point, then, has not been the existence of a regulatory authority with the capacity to legislate for all, but rather the opposite: No Rights or Duties existed for any states other than by the express consent of the parties. There has, of course, always been a notion of customary law and/ or *jus cogens*, but the purpose of these rules has predominantly been to serve as instruments for solving conflicts by upholding the foundational principle that no state should be bound by any law other than by its own consent.

The historical starting point in International Law, therefore, is not the existence of a clear cut divide between legislator and judiciary. But, importantly, historiy shows that the same could

[24] See Schabas (2006) and more recently Schlutter (2010), who in chapter five, V (p. 186-259) explicitly addresses "the findings of the ICTY on the evolution of new customary international criminal law..

[25] Milan Kuhli and Klaus Günther 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals', in von Bogdandy, A. and Venzke, I. (Eds) *International Judicial Lawmaking*. (Springer, 2012) p.365.

be said of National Law. Suri Ratnapala says of the situation in England in the 17th Century:

> Parliament exercised *jurisdictio*, not as a general legislature, but as the highest court. The legislative power of Parliament originated from its authority as the supreme court to supply a rule of law where no [rule] existed … However the infrequence and brevity of parliamentary sessions under the Tudors and the emergence of other courts provided the major impetus to the conversion of Parliament into a mainly legislative organ" [26]

In England, then, the 'Supreme Court' (Parliament) was initially involved in both application and justification. When economic and social relations reached a certain level of complexity this modus operandi became inadequate and parliament evolved into a purely legislative organ. There are many parallels between this state of affairs and the political situation we see in the contemporary international space. Although the political domain is functionally differentiated (broadly speaking between trade / economy; human rights/ fundamental rights, and Criminal Law/ Humanitarian Law) and although the international space is not completely devoid of legislative-like bodies (e.g., the UN, and various regional political corporations), it is accurate to say that courts are today operating on premises that resonate more with the functions of the 17th Century English Parliament, than, say, with a contemporary Danish (or German) High Court. In light of this, whilst the distinction between 'discourse of application' and 'discourse of justification' might be a useful heuristic, we should be cautious in our reception of it. It does, however, help us to articulate the extent to which 'judicial lawmaking' might be seen as the result of the *collapse* of our reliance on this convenient distinction. Kuhli and Günther's discussion *Kupreškić* is particularly revealing in this regard[27].

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[26] Suri Ratnapala, 'John Locke's Doctrine of the Separation of Powers: A Re-evaluation', *American Journal of Jurisprudence*, no. 38, 1993. p.196

[27] It should be noted that the *Kupreškić* decision on belligerent reprisals has been the object of much critique. Schlütter finds the Court's assessment of *opinio juris* "almost ironic" and she finds the Courts approach "radical" in that it is "more or less ignoring the relevant practice of states and orientating itself mostly towards the legal views of the ILC, the ICRC and the UNGA." (*See* p.235.) Schlütters abbreviations refer to: The International Law Commission, the International Committee of the Red Cross and the United Nations General Assembly). Similarly, Martins Paparinskis in *The British Year Book of International Law 2008* describes the decision as "sweeping" and says that "its legal rationale is subject to some doubt" and that the arguments used in the decision are "initially suspect" – see p. 323 -325. Kuhli and Günther then, follow an already established line of critique that has been levelled against this decision. Whilst we are not primarily concerned to endorse or condemn the decision *per se*, we do wish to make the case for a methodological approach that can explain how it was possible for the ICTY to arrive at their conclusion. That is, to show how the judgment on belligerent reprisals (i.e. the arbitrary killing of innocent

5. The ICC, ICTY and *Kupreškić*

The *Kupreškić* case was concerned with whether or not an armed attack on a small Bosnian village was a violation of the law of armed conflict or whether the attack was justified as a "belligerent reprisal".. The focus, therefore, is on how the ICTY decided on the issue of whether or not belligerent reprisals can be said to be allowed under international customary law and hence on whether the Court applied an already existing standard; or constructed a new standard? This question addresses a key object in general jurisprudence: What does it mean to declare what the law *is*? In the *Kupreškić* Decision, it seems that the law to be applied to the case is clear. The court in Para. 536 states:

> ...it must be noted, with specific regard to the case at issue, that whatever the content of the customary rules on reprisals, the treaty provisions prohibiting them were in any event applicable in the case in dispute. In 1993, both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949. Hence, whether or not the armed conflict of which the attack on Ahmici formed part is regarded as internal, indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals.

Despite what appears to be the identification of existing law on the matter, Kuhli and Günther suggest that the ICTY *makes* law in this case. They arrive at this conclusion by focusing on the argument developed in previous paragraphs of the decision. Here the Tribunal speculates about whether or not the prohibition on belligerent reprisals that already exist in treaty law could be said to constitute a universal requirement (i.e. could be said to exist as customary law). Here is a passage from the decision: [28]

> The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of

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civilians as an instrument of war) is not acceptable under customary international law. While we could have addressed the practice of the ICTY more generally, perhaps including more case law in our analysis, we have instead opted for an approach where the close discussion of one difficult case allows us to develop a more pointed analysis of the problems at hand.

[28] *Kupreškić*, Trial Judgment p.207-208.

> the elements of custom, namely *usus or diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

It might be considered superfluous for the ICTY to discuss the question of whether or not what is prohibited by applicable treaty law is also prohibited as international customary law. Why, we might ask, do the ICTY raise this question? The most obvious answer seems to be because the Secretary General of the UN in his original report, which contained the draft statute for the Tribunal stated: [29]

> The application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the adherence of some but not all States to specific conventions does not arise…

It would seem, therefore, that the Court perceives its function and legitimacy as closely related to the possibility of clarifying what the status of customary law is. Kuhli and Günther, commenting on the above quote from the *Kupreškić* case find it striking that the Tribunal "… by expressly referring to those states, decided the customary law question with a view toward possible future cases (involving the United States, France etc.) over which the ICTY itself would almost certainly have no jurisdiction."[30] This, however, might be a misreading of the Tribunal's intentions. Raising the issue might be seen as a way of explaining the weight that is needed to advance the argument that the provisions in question are valid law despite not receiving explicit support from a number of important states in the international community. One could say that the court openly addresses the fact that these states may have their reasons for not wanting to endorse these provisions as part of international law. It would therefore require compelling and weighty argument brought to bear on the decision to regard these provisions as forming influential part of customary international law.

[29] Quoted in Kuhli and Günther, *supra* note 23, p.369.
[30] *Ibid.* p.376.

These influential reasons are laid out in the following part of the decision, and the ICTY is quite transparent in this regard: *opinio juris* is what must lift the weight of the argument. Congruously, then, we see the ICTY in the following paragraphs advert to the various documents that may serve as evidence of a universal or widespread *opinion.* [31] But the Court also puts forward a broader view of the matter. At para. 528-9 the Tribunal states that:

> It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.
> 529. In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts.

Against this background of reasoning, Kuhli and Günther write:

> It is striking to note the types of reasons that the ICTY is providing here. We hear practical arguments concerning the effectiveness of reprisals relative to the effectiveness of courts [see para 530 – we do not discuss this issue here]. We hear purely moral arguments concerning the inhumanity of attacking civilians and civilian objects. These are not the kinds of reasons that bear on the task of identifying existing international law. They are reasons taken from a discourse of norm justification. Effectively the ICTY is arguing that customary law in this instance should be created. [32]

One could not find a more straightforward illustration of the fetishisation of a doctrinal distinction (between law 'as it is' and law as it 'ought to be'). In international law the distinction forces us desperately to invest qualities of permanence and pedigree in the notion of custom. Since Lauterpacht's

[31] *See* para. 529-535 (including footnotes).
[32] Kuhli and Günther, *supra* note 23, p. 378, original emphasis.

exposition of progressive interpretation, however, this is a particularly brittle device, and one that has had tenuous purchase for many years.[33] In moving to a conclusion we will argue that this distinction cannot be drawn with any analytical clarity, and that rather than imposing a mechanical formula for discerning what is customary in international law, we should instead be prepared to engage with the normative implications that press upon us within what we can call 'the matrix of judicialisation'. By this is meant the historical, moral, organisational and political context of international courts at work. We may say, with Torben Spaak, that 'recognising' or' identifying the empirical 'raw material' of law does not automatically reveal the semantic potential of its normative scope.[34] The *Kupreškić* case is a profound example of the importance of this observation, but the point is more general in International Law and can be made in parallel to the ECTHR's case law on LGBT rights. Let us then briefly consider the scope of principle involved[35].

6. Conclusion: Interpretation and Legality in International Law

In a recent study[36], Larry Helfer and Eric Voeten have shown how LGBT rights have become increasingly articulated, widened, accepted and integrated in the development of the aims of the convention. The various legal issues involved are: Decriminalisation of consensual sexual activity in private; Equalisation of age of consent for homosexual activity; the right to serve openly in the Armed Services; Equal treatment of unmarried (and later married) same-sex couples with regard to various social rights; Rights associated with gender reassignment, Transsexual marriage rights, and Rights to gender reassignment. Whilst the case law shows a marked development in the recognition of these various rights, the convention texts in which these rights are based have remained the same.

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[33] *See importantly* P. Capps "Lauterpacht's Method" *British Yearbook of International Law 2012*.

[34] Spaak says: **"**the identification of the legal raw material at the level of the sources of law is a purely factual matter, whereas the interpretation and application of this raw material often involves moral reasoning..." *See* Spaak, Torben "Legal Positivism and the Objectivity of Law." *Annalisi e Diritto*, Vol. 253, pp. 253-267, 2004.

[35] The case law on LGBT rights is merely one of a number of examples that we could have used as illustration of our point. The extensive and evolving interpretation of the European Convention, according to its nature of "living instrument", can be referred to several other topics, as for example a number of bio-ethically sensitive issues which have gained prominence in recent years in ECtHR jurisprudence.

[36] Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' *International Organization*, vol. 67 (forthcoming 2013)

We are talking particularly about the longstanding articles 8, 12 and 14; respectively: rights to privacy, rights to marry, and the right not to be discriminated against. The 'raw' sources of law have, then, remained the same for 50 years; yet the perception of what that law entails with regards to LGBT rights has evolved. Does this mean that ECTHR has developed new law? On one interpretation of what that question means, the answer would be an obvious 'Yes'. If, however, one takes as a starting point for legal interpretation that which was immediately apparent to the consciousness of the representatives that drafted the convention texts, then it would be plausible to suggest that the purpose of setting out a right to privacy, or a right not to be discriminated against, was not intended as an instrument that should be used to force member states to condone homosexual activity, or for them to formally re-register the sex of post-operative trans-sexuals. In fact, Art. 14 does not even list sexual orientation as one of the grounds that may give rise to a claim of equal treatment: sexual orientation has become accepted only as such through the general clause of "other status". When the convention was adopted few would have perceived homosexual or trans-sexual activities as envisaged by this kind of protection. On this view (i.e. some version of Scalia's "original intent" thesis),[37]t he ECTHR 'makes' new law in these instances.

On a less *static* view, however, the textual foundation of the law is so wide that the protection of these rights can easily be seen as covered by the relevant provisions. Organically speaking, the law is not (an immediate or unreflective) intention frozen in time, but rather, a textual expression of moral and social value arising in more or less specific circumstances from commitment to a more or less general normative principle. Standards of behaviour that cohere with this commitment may demand that previous understandings of the scope and application of legal rules are revised and developed over time and circumstance. The law, on this view, demands a commitment to the principled social values expressed textually, but not a commitment to a *fixed* historical version of what that text should mean. The consequence of this is that although the drafters did not have in mind, for example, homosexual activity when they drafted Articles 8 and 14, the value of respect for the principles underpinning privacy and equal treatment are seen as better served if one accepts that these activities do indeed fall within the ambit of the textual provisions.

In explaining how and why movement between on the on ehand, text (as 'raw material'), and, on the other, principle (as

[37] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law.* (Princeton University Press, 1998)

the *semantic* source of binding normative potential), can and must vary in magnitude, we need only consider the complexity of the matrix of judicialisation alluded to above. Some forms of legal regulation are, relatively speaking, semantically and normatively precise, that is, they have a more limited and focused semantic scope (regulation of pension age can be seen as an example of this). Others, as illustrated in *Kupreškić* and in our Human Rights examples, are more open. In both cases, the law operates as a form of adjustment mechanism, the function of which is to co-ordinate action in the public sphere.[38] If we imagine legal rules functioning in socially co-ordinatory and regulatory terms as bumpers or shock absorbers, legal texts that appear specific and detailed express a higher level of consensus and/ or a need for close co-ordination of action. Conversely, wider constructive interpretation responds to more expansive problems. One might imagine the two contrasting contexts of co-ordinatory action in terms of, on the one hand, and for example, the tightly constrained proximities of the individual wagons on a high speed train, as opposed, on the other, to the looser and more unpredictable relations between automobiles on roads and motorways. Co-ordination takes place in both cases, but where there is little room for manoeuver (as with the individual wagons of a high-speed train) shock absorption is short, sure, unilinear and homogeneous. Employing this metaphor, we can say that, when the ECTHR, for example, uses its interpretive discretion to say that LGBT rights are protected by the convention, they adapt to the more expansive co-ordinatory context that is available to them; that is, they become sensitive to the more diverse trajectories of more subtlely responsive, slower moving vehicles on wider roads and motorways. Precisely because there is such a scope for interpretive manoeuver, the ECTHR has a more onerous responsibility with regards to the co-ordinatory effect of its rulings. The Court itself is aware of this. In a decision from 2003 (*Karner* v. *Austria*), the Court says that, it "determine[es] issues on public-policy grounds in the common interest …", thereby signalling the aim of building public consensus in legitimising support for their interpretive strategies.

This being said, there are obvious differences between the ICTY and the ECTHR. The ECTHR has a much longer history, has rendered more decisions, operates on the basis of treaty text, has a permanent existence, a much wider jurisdiction and so on. Yet there are also obvious similarities. Both Courts are international courts situated in Europe, both courts are assigned cases that relate to basic moral issues (i.e. human rights / humanitarian law), and both Courts were created as a response to war time atrocities. It is plausible to assume, therefore, that

[38] *See* Postema, *supra* note 12.

some of the same mechanisms that one finds in the ECTHR's approach case law might also be common to the ICTY. One difference, however, should perhaps be singled out: Whereas the ECTHR adjudicates cases between states and individuals who claim that their rights have been violated, the ICTY adjudicates criminal cases against individuals.
The ECTHR can pronounce that a state acts in contravention of the convention – the ICTY can send an accused individual to prison. This difference is important – and it stresses the important role in all ICTY case law of *nullum crimen sine legem*, a principle which is also set out in the ECHR, art 7. Insisting *statically* on the observance of this maxim threatens to return us to square one, but this need not be so.

What is it that gives a certain decision its legal character? Faced with this question the positivist's 'source thesis' stands out as particularly attractive: If normative membership in law's limited domain is determined by criteria which are defined exclusively in terms of non-evaluative matters of social fact, then it will be a morally-neutral endeavour to identify what the law *is*. Driven by a demand for positive identifiability it appears to be possible, by detaching *the legal* from issues of morality and politics, to make legal judgments on the basis of simple empirical facts. The rationale for this approach, paradoxically, suggests a *moral* advantage in serving the Rule of Law in that classically, this detachment equates to the liberal assurance that the state apparatus does not use its power arbitrarily.[39] But, as we have seen in our lengthy examination of the concept of law's autonomy, the problem is that methodologically, it is simply not possible to avoid an overlap between law and morality. Thus, whilst there are good reasons to distinguish between instances of law-making and law application, and while law-*making* can be entirely legitimate (as Kuhli and Günther concede), it might be worth considering whether the process of identifying what the law *is* involves value judgments of the kind Kuhli and Günther seem to dismiss.[40]

The legal matter before the court in *Kupreškić* asks if it is possible to identify sufficient support for a prohibition against belligerent reprisals in customary law. The ICTY recognised that there was not sufficient evidence in the form an existent and consistent state practice to support the view that belligerent reprisals are illegal. But they then argued that customary law might be identified through a study of the *opinio juris* of state agents. Whilst customary law usually requires that both the

[39] For a good exposition, *see* H.L.A. Hart, 'Positivism and the Separation of Law and Morals' *The Harvard Law Review*, vol. 71, No. 4, 1958. pp.593-629.
[40] *See* Kuhli and Günther. *supra* note 18, p.378.

conditions of *usus* and *opinio* be met, in this type of case (where *usus* is more a matter of refraining from engaging in certain activities) *opinio* plays a much greater role in establishing the foundation of law on the issue. To identify what the law *is*, therefore, it is necessary to undertake an inquiry into what relevant agents take the law to be. In so doing, one cannot rely on a criterion of absolute consensus - one must allow, critically, for the possibility that some agents reason perversely. It is necessary, therefore, to operationalise criteria for sifting the central and correct conceptualisations of the legal duty from the peripheral and diluted understandings – and, in turn, these diluted understandings from the plain *wrong* understandings of the requirements of international law with regard, in this case, to belligerent reprisals.[41] To identify what the law *is*, one must, in other words, engage in an interpretive exercise to what both Lauterpacht and Dworkin see as 'Constructive Interpretation'. For Lauterpacht, this requires a construction of an image of what international law is *for* and what values it serves. In answering these meta-legal questions, law must stand up and be counted as to what, precisely, are its identifiable normative orientations. Customary authorities are not, then, to be seen as static empirical objects but rather, ideal-typical reconstructions of existing practices viewed in the best possible light. They are judgments about what best appears to justify the overall enterprise of having a system of international rights and duties that impose limitations on the freedom of individuals and states. Hence, if a tribunal engages in normative discourse - as did the ICTY in *Kupreškić* case - one should not necessarily, as Kuhli and Günther suggest, perceive this as an instance of *ad hoc* law-making. Rather, this judicial activity is more accurately rendered as an attempt to serve the often unattainable ideals of law's autonomy by showing *publicly* and *transparently* how the court arrives at their conclusions about *what the law is*.[42]

[41] *See* John Finnis *Natural Law and Natural Rights*. (The Clarendon Press, Oxford, 1980 Chapter 1.

[42] *See* H. P. Olsen and S. Toddington *Law in its Own Right* (Oxford, Hart Publishing, 1999) Chapter 1. Here we give an account of the way legality is located in a 'continuum of practical reason' and strives to produce legitimacy in a process of 'transparent autonomy'.

Bibliography

Alter, Karen 'The New International Courts: A Bird's Eye View'. *Buffett Centre for International and Comparative Studies Working Paper Serie*s, Vol. 09, No. 001 (2009) pp. 1-46.

Alter, Karen 'The Global Spread of European Style Courts'. West European Politics. Volume 35, Number 1, (2012) pp. 135-154.

Besson Samantha,'Theorizing the Sources of International Law', in: Samantha Besson and John Tasioulas (eds.) – *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010)

Samantha Besson and John Tasioulas (eds.) – *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010).

Cassese, Antonio *Realizing Utopia* (Oxford University Press, 2012).

Collins Richard and White, Nigel D. (eds.), *International Organizations and the idea of Autonomy: Institutional Independence in the International Legal Order* (London; New York: Routledge, 2011)

Dunoff, J. L. and Trachtman J. P., (eds.) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009)

Dworkin, ,Ronald *Law's Empire*. (Fontana Press, 1986)

Finnis, John *Natural Law and Natural Rights*. (The Clarendon Press, Oxford, 1980)

Fitzmaurice, Malgosia: Dynamic (Evolutive) Interpretation of Treaties, Part I, *21 Hague Yearbook of International Law* (2008), pp. 101-153.

Fitzmaurice, Malgosia: Dynamic (Evolutive) Interpretation of Treaties, Part II, *22 Hague Yearbook of International Law* (2009), pp. 3-31.

Hart, H. L. A. (a) Positivism and the Separation of Law and Morals. *The Harvard Law Review*, vol. 71, no. 4 (1958) pp. 93-629.

Hart H. L. A., (b) *The Concept of Law*. (Oxford University Press, Clarendon Oxford, 1961 and (c) 3rd Edition 2012)

Helfer Laurence R. and Voeten Erik 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europ' *International Organization*, vol. 67 (forthcoming 2013)

Venzke Ingo *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. (Oxford University Press, 2012)

Kelsen, Hans, (a) *Principles of International Law*, edited by R. W. Ticker (Holt, Rhinehart and Winston Inc. 1967)

Kelsen, Hans (b) *The Pure Theory of Law* (Max Knight [Trans.] University of California Press, Berkeley, 1967)

Klabbers, J. Peters, A. and Ulfstein, G. *The Constitutionalization of International Law* (Oxford University Press, 2009)

Koskenniemi,M. (2007) 'The Fate of Public International Law: Between Technique and Politics'. *The Modern Law Review*, Vol. 70, Issue 1 (2007) pp. 1-30.

Kuhli Milan and Gunther Klaus 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' in: Armin von Bogdandy and Ingo Venzke (eds.) – *International Judicial Lawmaking*. (Springer, 2012)

Luban, David: Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law, *Georgetown Law Faculty Working Papers* (2008) (Electronic copy available at SSRN: http://ssrn.com/abstract=1154177).

Madsen M. R. (a), 'The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', In M. R. Madsen and J. Christoffersen (eds.), *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press, 2011)

Madsen M. R. (b), 'Legal Diplomacy - Law, Politics and the Genesis of Postwar European Human Rights', In S. L. Hoffmann (ed.), *Human Rights in the Twentieth Century: A Critical History*, (Cambridge: Cambridge University Press, 2011),

Merrills John: "International Adjudication and Autonomy" in: Richard Collins and Nigel D. White (eds.), *International Organizations and the idea of Autonomy: Institutional Independence in the International Legal Order* (London; New York: Routledge, 2011)
Olsen H. P. and Toddington S.. *Law in its Own Right* (Oxford, Hart Publishing, 1999)
Paparinskis, Martins 'Investment Arbitration and the Law of Countermeasures, in´: The British Year Book of International Law (Oxford University Press, 2008)
Paulus Andreas, 'International Adjudication', in: Samantha Besson and John Tasioulas (eds.) – *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010).
Postema Gerald J., 'Law's Autonomy and Public Practical Reason', in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996).
Ratnapala,Suri "John Locke's Doctrine of the Separation of Powers: A Re-evaluation" in *American Journal of Jurisprudence*, no. 38 (1993)
Robinson, Darryl: A Cosmopolitan Liberal Account of International Criminal Law", *Leiden Journal of International Law* (forthcoming) (Electronic copy available at: http://ssrn.com/abstract=2122926)
Romano P.R.,'The Proliferation of International Tribunals: Piecing together the Puzzle'. NYU *Journal of International Law and Politics*, Vol. 31, No. 4, (1999) pp. 709-51.
Romano,C.P.R. 'A Taxonomy of International Rule of Law Institutions'. *International Dispute Settlement*, Vol. 2. (2011)
Scalia,Antonin *A Matter of Interpretation: Federal Courts and the Law.* (Princeton University Press, 1998)
Schabas, William, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (Cambridge University Press, 2006)
Schlutter Birgit, *Developments in Customary International Law* (Martinus Nijhoff Publishers, 2010)
Yuval Shany – *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2004).
Shapiro Martin M. and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002)
Slaughter,A. M. *A New World Order* (Princeton University Press, 2004).
Spaak, Torben 'Legal Positivism and the Objectivity of Law'. *Annalisi e Diritto*, Vol. 253, pp. 253-267, 2004.
Wildhaber,Luzius 'The European Court of Human Rights in Action', in *Ritsumeikan Law Review*, vol- 21. (2004)

CASE LAW

European Court of Human Rights

Tyrer v. *The United Kingdom,*1978, no. 5856/72.
Hauschildt v. *Denmark*, 1990, series A, no 154; no. 10486/83.
Karner v. *Austria*, 2003, no. 40016/98
Tysiac v. *Poland*, 2007, no. 5410/03

International Court of Justice

Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports, 1949, p. 174.

International Criminal Tribunal for the Former Yugoslavia

Kupreškić, Trial Chamber Judgment, 14 January 2000, Case No. IT-95-16-T